UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

J.D. IRVING, LIMITED,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 98-357-P-H***
	)	
ASA B. ALLEN, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

J.D. Irving, Limited ("J.D. Irving"), a Canadian corporation, seeks specific performance in this diversity action of an alleged contract with Asa B. Allen of Florida and William C. Bullock, Jr. of Maine for the sale of all of the capital stock of Burnt Hill Fishing Club ("Club"), a Maine corporation the principal asset of which is land and fishing rights in New Brunswick, Canada. First Amended Complaint for Declaratory and Injunctive Relief ("Complaint") (Docket No. 2) at 1, 4-5.

Allen and Bullock now move for summary judgment. Defendants' Motion for Summary Judgment (Docket No. 6). For the reasons that follow, I recommend that the motion be denied.[1]

[1]The defendants have requested oral argument on the pending motion. Docket No. 18. Because I am satisfied that the written submissions of the parties adequately address the issues raised, their request for oral argument is denied. *See* Local Rule 7(f).

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

II. Factual Context

The following undisputed facts are material to the grounds upon which I base this recommended decision.

J.D. Irving is incorporated under the laws of the Province of New Brunswick, Canada and maintains its principal place of business in St. John, New Brunswick.[2] Complaint ¶ 1; Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Defendants' SMF") (Docket No. 7) ¶ 1. Allen is an individual residing in Key Largo, Florida and Bullock an individual

[2]The parties do not clarify the relationship of James D. Irving to J.D. Irving. For purposes of this motion, I will assume he is a principal thereof.

residing in Orrington, Maine. Complaint ¶¶ 2-3; Defendants' Answer, etc. ("Answer") (Docket No. 4) ¶¶ 2-3. Allen and Bullock (together, the "Sellers") own 100 percent of the capital stock of the Club, whose primary asset consists of land and fishing rights on the Miramichi River in New Brunswick. Complaint ¶ 4; Answer ¶ 4. The Club operates an outfitting and guiding business on the Miramichi River, a major salmon fishing river in New Brunswick. *Id*. Among the Club's other assets is a bank account located in the State of Maine. Deposition of Gerald E. Rudman, Esq. ("Rudman Dep."), attached as Exh. A to Plaintiff's Statement of Material Facts as to Which There Exists a Genuine Issue To Be Tried ("Plaintiff's SMF") (Docket No. 11), at 10.

On or about April 17, 1998 attorney Gerald E. Rudman, acting on behalf of the Sellers, wrote James D. Irving:

> Dear Jim:
>
> Following our series of telephone chats over the past few days, I now have authority of Asa Allen (through his attorney, Carl Hanson) and William C. Bullock, the sole owners of the capital stock of Burnt Hill Fishing Club (a Maine corporation), to confirm to you that they will sell the capital stock to J.D. Irving, Ltd. as follows:
>
> 1. $712,500 (Canadian) in cash to Mr. Allen
>
> 2. $750,000 (Canadian) to Mr. Bullock, payable $150,000 (Canadian) in cash and $600,000 by J.D. Irving, Ltd. Promissory Note payable with interest at Royal Bank prime rate adjusted monthly, in four annual installments on the anniversary date of the Note. The stated principal of the $600,000 (Canadian) Note will be adjusted to U.S. funds.
>
> The definitive Purchase and Sale Agreement for the transaction will provide, among other things, that owner occupancy weeks in 1998 shall be at the 1997 owner occupancy rates for Mr. Allen and his guests and Mr. Bullock and his guests.
>
> The real property, personal property and all of the tangible property as well as all cash deposits for 1998 bookings will be assets of the corporation. Any excess cash will be distributed to the shareholders prior to Closing. The corporation has no debt and no obligations, except for an issue with Revenue Canada on Canadian corporate

income returns, which we believe will be cured. Maybe with the help of your tax people, we can make the cure quicker. The shareholders will not provide personal indemnities in the sale.

You have requested a 14 day period to attend to such due diligence as a buyer as you deem appropriate. Messrs. Allen and Bullock accordingly grant you an option to purchase, expiring April 24, 1998. I will provide you with such information on the Club's operation as you may request.

Please confirm.

Cordially,

Gerald E. Rudman

***

P.S.

The unbooked week of 8/22 - 8/29/98 will be reserved for you.

Letter from Gerald E. Rudman to Jim Irving dated April 17, 1998 ("April 17 Letter"), attached as Exh. A to Defendants' SMF.

Rudman followed up with a letter dated April 20, 1998 stating:

RE: Burnt Hill Fishing Club - Commitment Letter of April 17, 1998

Dear Jim:

I hasten to correct the date of April 24, 1998 stated in the final paragraph of the subject letter. The date should have been May 1, 1998.

Cordially,

Gerald E. Rudman

Letter from Gerald E. Rudman to Jim Irving dated April 20, 1998, attached as Exh. B to Defendants' SMF.

The April 17 Letter was preceded by several rounds of discussions during which the parties

negotiated terms of the proposed transaction, including price. Rudman Dep. at 11-17 and handwritten notes attached as Exhs. F, G to Plaintiff's SMF. Rudman solicited, received and incorporated comments from the Sellers and their other counsel prior to finalizing the April 17 Letter. Rudman Dep. at 16-20. Rudman, for example, exchanged telefaxes with Carl Hanson, an attorney for Allen, refining the terms of the letter. *Id.*; Correspondence between Gerald E. Rudman and Carl Hanson, attached as Exhs. H-L to Plaintiff's SMF.

Following receipt of the April 17 Letter J.D. Irving contacted Rudman to ascertain the procedure it should follow to exercise the option. Letter dated April 27, 1998 from Gerald E. Rudman to Stockholders, Burnt Hill Fishing Club, attached as Exh. M to Plaintiff's SMF. J.D. Irving also requested and received an extension of the option to May 4, 1998. *Id.*; Rudman Dep. at 27.

On or about May 1, 1998 J.D. Irving responded to the April 17 Letter as follows:

> Dear Mr. Rudman:
>
> Further to your letter of April 17, 1998, J.D. Irving, Limited hereby gives notice of its exercise of the option to purchase all of the issued and outstanding capital stock of Burnt Hill Fishing Club. The purchase will be on the terms set out in your letter of April 17, 1998, subject to the execution of a mutually acceptable Purchase and Sale Agreement containing the normal representations for such a transaction.
>
> Please provide the undersigned with a draft copy of the Purchase and Sale Agreement at your earliest convenience.
>
> Yours truly,
>
> James D. Irving

Letter from James D. Irving to Gerald E. Rudman dated May 1, 1998 ("May 1 Letter"), attached as Exh. C to Defendants' SMF. J.D. Irving anticipated that Rudman, with whom it had previously

dealt, would know what it meant by the phrase "normal representations for such a transaction." Affidavit of William Dever ("Dever Aff.") (Docket No. 13) ¶ 11. Rudman testified that experienced practitioners of corporate law understand what terms constitute "traditional or normal representations" for a stock sale. Rudman Dep. at 28. Both J.D. Irving and Rudman understood such representations to include a representation by the sellers as to the adequacy of title to land owned by the corporation. *Id*. at 33-34; Dever Aff. ¶ 11.

Following receipt of the May 1 Letter Rudman on at least two occasions referred to it as an "exercise" of the option. Fax cover sheet from Gerald E. Rudman to William C. Bullock and Carl Hanson dated May 4, 1998, attached as Exh. N to Plaintiff's SMF; Letter from Gerald E. Rudman to Marjorie Tomlinson dated May 4, 1998 ("Tomlinson Letter"), attached as Exh. O to Plaintiff's SMF; Rudman Dep. at 29. Rudman in addition advised Marjorie Tomlinson of Prudential River Realty in New Brunswick to keep the transaction confidential, at J.D. Irving's request, and simply to explain to offerors and the public "that the property was taken off the market." Tomlinson Letter.

At deposition Rudman testified:

> Q. Was it your view that if Irving exercised this option before it expired, that Irving and your clients would then be under the mutual obligation to negotiate in good faith a purchase and sale agreement resolving any additional items or terms not expressly set forth in your April 17 letter?
>
> A. Yes.
>
> ***
>
> Q. And did you anticipate that Irving, upon receipt of the letter, would understand the letter in the same way that you do?
>
> A. Yes.
>
> ***
>
> Q. Was it your view, on May 5 . . . that J.D. Irving, Limited, had committed itself to your clients to go forward and purchase the stock, unless the parties were unable, in

good faith, to finalize a written purchase and sale agreement?

***

A. Yes. . . .

***

Q. Did you, after Irving exercised the option, did you feel that your clients were entitled to back out of the deal simply because they decided they didn't want to sell it?

***

A. No.

Rudman Dep. at 24-25, 29-30, 61.

On May 5, 1998 Rudman prepared a draft purchase and sale agreement containing the following language with respect to purchase price:

> [O]n the Closing Date (hereinafter defined), each Shareholder shall sell and transfer to the Buyer all of the shares of the capital stock of the Club which are issued and outstanding and the Buyer shall purchase all such shares from the Shareholders for the purchase price as follows:
>
> (i) $712,500 (Canadian) by wire transfer to Asa B. Allen; and
>
> (ii) $150,000 (Canadian) by wire transfer to William C. Bullock, Jr., and a $600,000 (Canadian) Promissory Note of J.D. Irving, Ltd, payable with interest at Royal Bank prime rate adjusted monthly, in four annual installments on the anniversary date of the Note, with the stated principal of $600,000 (Canadian) adjusted to and payable in U.S. funds.

Draft Purchase Agreement ("May 5 Draft"), attached as Exh. D to Plaintiff's SMF, § 1.1. Rudman believes he checked the April 17 Letter to make sure the draft accurately reflected its terms. Rudman Dep. at 81. Hanson reviewed the May 5 Draft and relayed to Rudman, *inter alia*, that, "Mr. Allen further requests that the funds due him be first converted to U.S. dollars, at the rate in effect at the time of closing." Letter from Carl Hanson to Gerald E. Rudman dated May 7, 1998, attached as Exh. E to Plaintiff's SMF.

J.D. Irving charged attorney William Dever, who had authored the May 1 Letter, with the task of working with Rudman to prepare the purchase and sale agreement. Dever Aff. ¶ 1; Deposition of William J. Dever, Esq. ("Dever Dep."), attached as Exh. A to Defendants' Reply Memorandum to Plaintiff's Opposition to Defendants' Motion for Summary Judgment ("Defendants' Reply") (Docket No. 15), at 17-18. Incident to that task, Dever reviewed the April 17 Letter. Dever Aff. ¶ 2. He construed the letter to mean that the cash payments were to be made in Canadian dollars at closing and that the payment amount for the note, specified in the agreement in Canadian dollars, was to be adjusted at the time of closing to U.S. dollars. *Id.* ¶¶ 3-4. The time of closing, he reasoned, was the only relevant future date that the parties could not know as of the time of exchange of the April 17 and May 1 letters. *Id.* ¶ 4.

On or about May 15, 1998 Rudman forwarded a thirteen-page draft purchase and sale agreement to Dever under cover of the following letter:

> RE: Burnt Hill Fishing Club
>
> Dear Bill:
>
> A draft of the Purchase Agreement is delivered to you now for your review and comment.
>
> Please note that Section 1.1(ii) reflects a different pay schedule to Bill Bullock from the April 17, 1998 letter to Jim (copy enclosed), to monthly payments rather than annual installments. Bill's recalculation determined that annual installments with Royal Bank prime, which is apparently 2% below the U.S. bank prime, was much to his disadvantage and hopes that the payment of the Note can be made by monthly wire transfers directly to his account at Merrill Merchants Bank.
>
> Section 4.2 Confidentiality Agreement was inserted at your request, I believe, and at the time that I received the request, I immediately contacted Marjorie Tomlinson at Prudential River Realty in Fredericton requesting that she explain to any other offerors and to the public that the property was taken off the market. Ms. Tomlinson agreed immediately. However, it appears that it is well known throughout the

> Boisetown area, apparently through Keith Pond, that J.D. Irving is the purchaser. Additionally, Mr. Allen has found it most uncomfortable to be unable to tell his friends that he has sold his shares to J.D. Irving. I would accordingly suggest that Section 4.2 be deleted.
>
> In Section 3.6, reference is made to income tax returns in the Province of New Brunswick, and you should know that we have authorized J. Ian M. Whitcomb, Q.C. of the Hanson, Hashey office in Saint John to initiate and pursue a discussion with David Jamieson to get a handle on clearing the problems with Revenue Canada as well as to share information for a determination of such Canadian taxes as may arise from this transaction.
>
> David Hashey, Q.C. is attending to the title opinion to cover Item 3.7.
>
> In respect to Section VII, please note that the attached Schedule VII was prepared by Lawrence E. Parker, Jr., CPA of Berry, Dunn, McNeil & Parker, and if your financial people have any questions about it, please be at liberty to have them telephone Larry at (207) 942-1600. The Schedule reflects payment of real estate taxes for the 1998 season as a charge against guest deposits for 1998 since the expense item is borne by the occupancy charges made for the season.
>
> Please call me at your first opportunity so that we can proceed as promptly as possible.
>
> Cordially,
>
> Gerald E. Rudman

Letter from Gerald E. Rudman to William Dever dated May 15, 1998 ("May 15 Letter"), attached as Exh. D to Defendants' SMF. The enclosed draft purchase and sale agreement, which contemplated a closing at the offices of Rudman & Winchell in Bangor, Maine on "the __ day of May, 1998," contained the following provisions regarding purchase price:

> 1.1 Purchase Price: [O]n the Closing Date (hereinafter defined), each Shareholder shall sell and transfer to the Buyer all of the shares of the capital stock of the Club which are issued and outstanding and the Buyer shall purchase all such shares from the Shareholders for the purchase price as follows:
>
> (i) $712,500 (Canadian), adjusted to and payable in U.S. funds (conversion rate as of 5/4/98), reduced by $24,500 (U.S. funds) plus any applicable

> taxes, representing four weeks of 1998 occupancy . . . by wire transfer to Asa B. Allen; and
>
> (ii) $150,000 (Canadian) adjusted to and payable in U.S. funds (conversion rate as of 5/4/98) by wire transfer to William C. Bullock, Jr. and a $600,000 (Canadian) (adjusted to U.S. dollars as of 5/4/98) Promissory Note of J.D. Irving, Ltd., payable with interest at Royal Bank prime rate adjusted monthly in forty-eight monthly installments commencing on the first day of the month next following the Closing.

Draft Purchase Agreement ("May 15 Draft"), attached as Exh. E to Defendants' SMF (handwritten notations disregarded), §§ 1.1, 2.1. The conversion rate on May 4, 1998 was 0.6972. U.S. Dollar table, Wall St. J., May 4, 1998, at C1, attached as Exh. O to Defendants' SMF. Rudman chose May 4 as the conversion date because it was the first business day after the day on which J.D. Irving's letter had been faxed to his office. Affidavit of Gerald E. Rudman, Esq. in Support of Motion for Summary Judgment ("Rudman Aff."), attached as Exh. P to Defendants' SMF, ¶ 5.

Dever did not review the May 15 Draft because before he had an opportunity to do so he became aware that changes already were proposed to the draft agreement as the result of a possible unanticipated title glitch that, if unresolved, would preclude the Sellers from making the normal representations regarding title. Dever Aff. ¶ 6. Rudman and Dever negotiated a proposed solution, about which Rudman informed Bullock by letter dated May 27, 1998:

> RE: Burnt Hill Fishing Club
>
> Dear Bill:
>
> The title to the real property continues to be a serious glitch. Both the real property lawyer in Dave Hashey's office as well as an independent real property lawyer in New Brunswick working for Irving apparently are satisfied that it will require a quiet title action to get a clear title, taking a number of months. In my discussions with Bill Dever, the J.D. Irving lawyer, Jim Irving has proposed that we would redraft the Agreement, sign it with an earnest money deposit and when the title was quieted, that we would proceed to close the transaction. In the event that they had any legitimate

concern about the title, they would not be obliged but would have the option to buy. I was unable to reach you by phone on your bus trip and your office could not tell me where to reach you before next Monday. Hence, I assumed the authority to commit to this on your behalf, which you probably can reverse if you wish.

This means that Merlin Palmer will be operating this year as he has in the past, and everybody can start sending in their deposits to Larry Parker. You should phone Merlin and explain, as well as to smooth his ruffled feathers on not being advised by either you or Asa when a decision was made to sell to J.D. Irving. . . .

Ian Whitcomb may have come up with a program to avoid Canadian tax on the sale. He is to discuss it with David Jamieson at J.D. Irving and report back.

***

Cordially,

Gerald E. Rudman

Letter from Gerald E. Rudman to William C. Bullock, Jr. dated May 27, 1998, attached as Exh. Q to Plaintiff's SMF. The proposed solution to the title problem was acceptable to the Sellers, as Rudman relayed to Dever by letter dated the following day:

RE: Burnt Hill Fishing Club

Dear Bill:

This will confirm to you that the Shareholders agree to go forward with a revised Purchase Agreement providing for consummation of the transaction in October, at the end of the present season, when we all expect that the title question will be resolved.

I will get a redraft of the Agreement to you during the week of June 1 which will provide for an earnest money deposit and the option to J.D. Irving to accept the transaction even if there remain some doubt [sic] about the quality of the title.

I further request that Keith Pond be instructed that since the Club will be operated by the Shareholders this season under the management of Merlin Palmer, that Mr. Pond refrain from any contact with Merlin or asserting his authority over the Club.

I will be away from my office until June 1 and will undoubtedly be chatting with you when I return.

Kindest regards.

Cordially,

Gerald E. Rudman

Letter from Gerald E. Rudman to William Dever dated May 28, 1998, attached as Exh. F to Defendants' SMF. The conversion rate on May 28, 1998 was 0.6878. U.S. Dollar table, Wall St. J., May 28, 1998, at C1, attached as Exh. O to Defendants' SMF. On or about June 1, 1998 Rudman forwarded a redraft of the agreement to Dever containing "just a few changes to fine tune this up to the present circumstances." Letter from Gerald E. Rudman to William Dever dated June 1, 1998, attached as Exh. G to Defendants' SMF. The purchase-price section of the enclosed draft agreement was identical to that of the May 15 Draft except for the deletion of reference to a $24,500 offset from the price payable to Allen. Draft Purchase Agreement ("June 1 Draft"), attached as Exh. H to Defendants' SMF, § 1.1. The closing date was moved to October 15, 1998. *Id*. § 2.1.

On or about June 4, 1998 Dever transmitted three proposed changes to Rudman: (i) a revision of section 1.2(a) to reflect an undertaking by the Sellers to apply for a New Brunswick certificate of title for the Club's real estate; (ii) the addition of eight sections of corporate representations regarding the status of such matters as pension plans, bank accounts, corporate records and legal compliance; and (iii) the addition of a section regarding conduct of the business prior to closing. Letter from William J. Dever to Gerry Rudman and enclosures therewith, attached as Exh. I to Defendants' SMF. Rudman incorporated all of the requested changes into the draft agreement, a copy of which he forwarded to Dever. Letter from Gerald E. Rudman to William Dever dated June 9, 1998, attached as Exh. J to Defendants' SMF; Draft Purchase Agreement ("June 3 Draft"), attached as Exh. K to Defendants' SMF.

On or about June 17, 1998 Rudman wrote to Dever:

> RE: Burnt Hill Fishing Club
>
> Dear Bill:
>
> Enclosed is what may be a final, clean draft of the Agreement.
>
> Please note that in Section 1.1(i) and (ii), that we have calculated the U.S. fund conversion based on a 5/4/98 conversion rate as published in the Wall Street Journal. It is my understanding that both Bill Bullock and Asa Allen are prepared to sign on and, if this is acceptable to you, please let me know and I'll send along and exchange with you a signature page.
>
> Cordially,
>
> Gerald E. Rudman

Letter from Gerald E. Rudman to William Dever dated June 17, 1998, attached as Exh. L to Defendants' SMF. The enclosed redraft of the purchase agreement specified payment to the Sellers as follows:

> (i) $712,500 (Canadian), adjusted to and payable in U.S. funds of $496,755 (conversion rate as of 5/4/98 at .6972), by wire transfer to Asa B. Allen; and
>
> (ii) $150,000 (Canadian) adjusted to and payable in U.S. funds of $104,580 (conversion rate as of 5/4/98 at .6972) by wire transfer to William C. Bullock, Jr. and a $600,000 (Canadian) (adjusted to U.S. dollars $418,320 as of 5/4/98 at .6972) Promissory Note of Buyer, payable with interest at Royal Bank prime rate adjusted monthly in forty-eight monthly installments commencing on the first day of the month next following the Closing.

Purchase Agreement ("June 17 Draft"), attached as Exh. M to Defendants' SMF, § 1.1. On June 15, 1998 the conversion rate was 0.6818. U.S. Dollar table, Wall St. J., June 15, 1998, at C1, attached as Exh. O to Defendants' SMF. It continued to fall thereafter. *See generally* U.S. Dollar tables, Wall St. J., attached as Exh. O to Defendants' SMF.

Upon receipt of the June 17 Draft Dever phoned Rudman to protest use of the May 4, 1998 conversion rate. Letter from Gerald E. Rudman to Carl Hanson dated June 18, 1998, attached as Exh. S to Plaintiff's SMF. Dever objected to the May 4 date, Rudman explained in a June 18 letter to Hanson, "since they [J.D. Irving] were ready to close that day and we were unable to close the transaction because of the title problem[.]" *Id*. Irving, Rudman relayed, "suggests that we come up with some thoughts to respond to his credible observation." *Id*. Possibilities, Rudman noted, included allowing the conversion rate to float until the closing date, perhaps with a formula to cushion the risk. *Id*. Rudman noted his intention to consult Bullock and sought Hanson's input. *Id*. He also advised Hanson that Dever indicated willingness to accommodate a request that the Sellers remain shareholders until year-end for tax purposes. *Id*.

By letter dated June 25, 1998 Rudman informed Dever that the Sellers stood firm on the May 4 conversion date:

> RE: Burnt Hill Fishing Club
>
> Dear Bill:
>
> The currency conversion rate is of issue, and I sincerely hope that Jim Irving can accede to the concept of the May 4, 1998 rate. The sellers' position is that the May 4 rate has existed in the several drafts of the Purchase Agreement and it was their clear understanding that that is the rate which would prevail so that neither party would be at risk.
>
> Please do review this again with Jim and let me know as soon as you can since I will be out of my office from June 29 to July 8, and I should dearly like to finish this before I leave.
>
> Cordially,
>
> Gerald E. Rudman

Letter from Gerald E. Rudman to William Dever dated June 25, 1998, attached as Exh. N to

Defendants' SMF.

Dever informed Rudman that J.D. Irving did not consider the Sellers' position on the May 4 conversion rate fair or appropriate but that Irving would consider the issue and that the deal would not fall apart over it. Dever Aff. ¶ 7. Dever understood at all times in the transaction that there were no issues of disagreement between the parties that might make them adverse to one another and that they were simply in the process of documenting the previously negotiated agreement. *Id*. ¶ 8. No one informed Dever that the Sellers would attempt to walk away from the deal if J.D. Irving did not accede to their position on the currency exchange rate. *Id*.

On August 5, 1998 Rudman telephoned Dever informing him that the Sellers had decided to take the property off the market. Rudman Aff. ¶ 9. As of that day the currency conversion rate was 0.6595. U.S. Dollar table, Wall St. J., August 5, 1998, at C1, attached as Exh. O to Defendants' SMF. Rudman explained to Dever that the Sellers had based their decision on the following: (i) the parties had not reached agreement on the currency conversion rate issue, (ii) the proposed purchase and sale agreement had not been executed and (iii) the Sellers had decided they no longer wished to complete the transaction. *Id*. Dever informed Rudman that Rudman's clients had no right to call off the deal but that J.D. Irving as an accommodation would fully accede to their position regarding the currency rate. Dever Aff. ¶ 9. J.D. Irving was ready, willing and able to execute the draft purchase and sale agreement that the parties had arrived at, and so informed Rudman. *Id*. ¶ 10. The parties never executed a final purchase and sale agreement. Dever Dep. at 39.

During the course of negotiations between J.D. Irving and the Sellers, Rudman undertook to represent Bullock in attempting to buy out Allen's shares in the Club. Correspondence between Gerald E. Rudman and Carl Hanson, attached as Exhs. T-W to Plaintiff's SMF. No buyout was

effectuated. *Id*. Bullock later informed Irving that "he had not really wanted to sell in the first place, but Mr. Allen caused everything to come to a boil." Memorandum from DODIE to GER dated August 26, 1998, attached as Exh. X to Plaintiff's SMF.

When questioned at deposition as to whether he felt as of May 29, 1998 "that the deal had changed so much that [he] wanted to withdraw from the sale," Bullock replied:

> I was concerned about the sale going through, and subsequently, I wanted to make sure that there was — I was extremely concerned about the real estate side of it. I had no idea that the title wasn't clear. And with the actions of Mr. Pond, I had real concerns about the good faith of the Irvings in carrying out the transaction here.

Deposition of William C. Bullock, Jr. at 37-38. Pond, a J.D. Irving representative, had erroneously informed the Sellers' camp manager in early April that J.D. Irving had purchased the camp. *Id*. at 35-37. Bullock stated that, in response to his expression of concern about the deal, Rudman advised him that "at this point in time, you are committed to the transaction . . . ." *Id*. at 40.

Bullock, however, described the conversation in which he subsequently informed Rudman that he wanted to withdraw from the transaction as follows:

> A. Our discussion was verbal, and as I recall, his response was a typical lawyer-client response, saying, "Now, you're sure you want to do this?" And I said, "Yes," and I said, "This thing has been in the air for a long period of time. Nothing has been signed. As we proceed on this, more and more adverse factors come to light and I, since nothing has been signed, I don't see any reason why we are committed any further on this."
>
> ***
>
> Q. Did Mr. Rudman have any comment or response to your assertion that, since nothing had been signed, you would not be committed to Irving at that point?
>
> A. I don't recall any comments to that regard.

Id. at 62-63.

All draft purchase and sale agreements of record contain an identical representation that "[t]he Club has good, indefeasible and marketable title to all of its real and personal property which it purports to own, free and clear of all security interests, liens, encumbrances, restrictions, and other burdens." May 5 Draft § 3.7; May 15 Draft § 3.7; June 1 Draft § 3.7; June 3 Draft § 3.7; June 17 Draft § 3.7.

III. Discussion

A. Choice of Law

In a diversity action such as this, a federal court must apply the choice-of-law rules of the state in which it sits. *Priestman v. Canadian Pac. Ltd.*, 782 F. Supp. 681, 685 (D. Me. 1992). The Law Court has embraced the "most significant contacts and relationships" test of the Restatement (Second) of Conflict of Laws. *Id.* This principle, the Sellers contend, leads to application of Canadian law. Defendants' Memorandum of Law in Support of Summary Judgment ("Defendants' Memorandum") (Docket No. 6) at 5-6; Defendants' Reply at 1. J.D. Irving, on the other hand, perceives Maine as the state with the most significant relationship to this case. Plaintiff's Opposition to Defendants' Motion for Summary Judgment with Incorporated Memorandum of Law ("Plaintiff's Opposition") (Docket No. 10) at 1-4.

As the Sellers and J.D. Irving agree, the Law Court in a breach-of-contract case would turn to the Restatement (Second) of Conflict of Laws § 188 ("Restatement § 188") for guidance in determining which state's (or nation's) law applies. Defendants' Memorandum at 5-6; Plaintiff's Opposition at 2: *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 918 (Me. 1983), *overruled on other grounds by Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989). Section 188 delineates five relevant factors:

1. *Place of contracting*. The place of contracting in this case (assuming *arguendo* the existence of a binding contract) is Maine, the locus of the Sellers' receipt of J.D. Irving's acceptance via the May 1 Letter, inasmuch as that is "where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect[.]" Restatement § 188 cmt. e. Inasmuch as appears, the Law Court has not had occasion to consider the question of what constitutes the last act necessary to give binding effect to an option contract. Were it presented with such an issue, however, it likely would follow the Restatement (Second) of Contracts § 63, pursuant to which "acceptance under an option contract is not operative until received by the offeror."

2. *Place of negotiation of the contract*. The record reveals that the alleged contract in this case was negotiated by telephone, mail and telefax contacts between Rudman in Maine and the following: Bullock in Maine, Hanson/Allen in Florida and J.D. Irving in Canada. J.D. Irving points out, and it is evident from the record, that Rudman served as the "hub" of negotiations. *See* Plaintiff's Opposition at 4. While multistate long-distance negotiating tends to attenuate the importance of this contact, *see* Restatement § 188 cmt. e, the prominence of Rudman's role as coordinator (a Maine contact) is noteworthy in this case.

3. *Place of performance*. The closing of the transaction at issue in this case was scheduled to occur in Bangor, Maine.

4. *Location of the subject matter of the contract*. The contract at issue, as J.D. Irving emphasizes, is for the sale of shares of stock in a Maine corporation. Plaintiff's Opposition at 2-3. It is not a contract for the transfer of an interest in real estate; the Club, a Maine corporation, would continue post-transaction to own the New Brunswick land that attracted the attention of J.D. Irving. While the Sellers protest that the land is the true subject matter of the contract, they cite no authority,

nor can I find any, standing for the proposition that particular assets of a corporation might form the "subject matter" of a contract to transfer ownership of a corporation's shares.[3] *See* Defendants' Memorandum at 6; Defendants' Reply at 1; *compare, e.g.*, *Davis v. Grimes*, 175 A. 238, 240 (N.H. 1934) (corporate shares not same thing as land or an interest in land, although corporation may own real property). The parties' unsigned draft purchase and sale agreements focus on the transfer of shares and the conduct of the Sellers' business — issues of obvious importance to the state of incorporation, Maine.

5. *Domicil, residence, nationality, place of incorporation and place of business of the parties*. Because J.D. Irving is a Canadian corporation, Bullock a Maine resident and Allen a Florida resident, this factor does not cut in favor of the application of either Canadian or Maine law.

In summary, the predominance of Maine's interest with respect to a majority of relevant contacts favors the application of Maine law to the instant contract dispute.

B. Existence of Binding Agreement

The Sellers seek summary judgment primarily on the ground that J.D. Irving cannot meet its burden of proving the existence of a binding agreement — a predicate for the grant of specific performance. Defendants' Memorandum at 7; *Ouellette v. Bolduc*, 440 A.2d 1042, 1046 (Me. 1982) (party seeking specific performance of contract must show meeting of minds). Specifically, the Sellers contend, J.D. Irving fails as a matter of law to evidence that the parties either agreed on all essential terms or manifested an intent to be bound. Defendants' Memorandum at 7.

[3]The Sellers cite the Restatement (Second) of Conflict of Laws § 189 for the proposition that when land is the subject matter of a contract, the local law of the state or foreign country where the land is situated applies. Defendants' Memorandum at 6. Section 189, however, is inapposite inasmuch as it pertains to the "validity of a contract for the transfer of an interest in land and the rights created thereby[.]" Restatement (Second) of Conflict of Laws § 189.

1. Consensus on Essential Terms

Contracts are unenforceable, under Maine law, unless the parties reach accord on all material terms. *Searles v. Trustees of St. Joseph's College*, 695 A.2d 1206, 1211 (Me. 1997). The parties in this case, according to the Sellers, never achieved a meeting of the minds with respect to an element that, by anyone's definition, would rate as essential: the price. Defendants' Memorandum at 7-8. This is evidenced, the Sellers assert, by the continuation of negotiations beyond May 1, 1998 (the time of formation of the asserted contract) on the U.S.-Canadian dollar conversion rate, a matter over which the parties were unable to see eye to eye. *Id*. Title, another essential item, also remained unresolved, the Sellers contend. Defendants' Reply at 1-2. The Sellers had no obligation to extend the closing or to clear title at their expense, at least without locking in the May 4 conversion rate, they note. *Id*. Had they chosen not to do so, J.D. Irving could have walked away from the deal without liability.[4] *Id*. at 2.

J.D. Irving counters, and I am persuaded, that there is sufficient evidence of record from which a reasonable trier of fact could find in its favor on these points. Plaintiff's Opposition at 11-15. A trier of fact could conclude that:

1. The April 17 Letter, containing the Sellers' offer, and the May 1 Letter, setting forth J.D. Irving's acceptance, illustrate a meeting of the minds that Allen was to be paid in Canadian dollars and Bullock partly in Canadian dollars and partly via a promissory note to be adjusted from Canadian to U.S. dollars at an unspecified future date. This is strongly evidenced by the words of the April 17 Letter itself, a carefully prepared document that contemplates conversion for the

[4]In their reply brief, the Sellers do not press a suggestion that the parties' alleged agreement was incomplete on a third ground: omission of the closing date. *See* Defendants' Memorandum at 16; Plaintiff's Opposition at 13 n.1; Defendants' Reply at 1-2.

promissory note but omits any mention of conversion for the two upfront cash payments, and Rudman's initial mirroring omission in the May 5 Draft of any mention of U.S. dollar conversion of the two upfront cash payments. The interpolation of the May 4 conversion date into the May 15 Draft thus could be construed as a unilateral change by the Sellers in the parties' agreed-upon terms regarding price.[5]

2. Although the date of conversion of the promissory note was omitted in the April 17 Letter, the parties intended it to transpire at closing, which as of May 1 was anticipated to be imminent (note the anticipated closing date of "__ day of May, 1998" in the May 15 Draft). Dever so construed the April 17 Letter. Section 1.1 of Rudman's May 5 Draft also can be so construed: "on the Closing Date . . . each Shareholder shall sell and transfer to the Buyer all of the shares of the capital stock of the Club . . . for the purchase price as follows: . . . a $600,000 (Canadian) Promissory Note . . . with the stated principal of $600,000 (Canadian) adjusted to and payable in U.S. funds."

3. There was no omission of an essential term regarding title. A warranty by the Club of good title to the New Brunswick land was implicit in the transaction (both Rudman and Dever acknowledged that it would constitute a customary representation in such cases), was made explicit by the Sellers' authorized agent, Rudman, as early as the May 5 Draft and was carried into all

[5]The record reveals that J.D. Irving did not object to the insertion of the May 4, 1998 conversion factor until receipt of the June 17 Draft, which was the third draft it had received containing such a provision. J.D. Irving, moreover, submitted detailed proposed changes in response to the June 1 Draft, none of which touched on purchase price. These facts raise a significant question whether J.D. Irving either acknowledged the correctness of, or acquiesced in, the addition of the May 4 conversion rate. There is evidence, however, from which a trier of fact could conclude that no such acknowledgement or acquiescence was intended. The Sellers, for example, did not call attention to the change in the cover letter accompanying the May 15 Draft. In any event, J.D. Irving's attorney, William Dever, attests that he did not read the May 15 Draft because it was overtaken by events. Finally, the Sellers did not call attention to use of the May 4 conversion rate until June 17. Dever possibly could have overlooked its use in the June 1 Draft.

subsequent drafts of record. When it appeared that the title was problematic (thus entitling J.D. Irving to walk away from the deal), the parties chose instead to negotiate a solution.[6]

2. Intention To Be Bound

The Sellers next argue that the alleged contract is unenforceable inasmuch as J.D. Irving evidenced an intention, in its May 1 Letter, not to be bound until the execution of final documents. Defendants' Memorandum at 11-17. It did so, the Sellers contend, by stating: "The purchase will be on the terms set out in your letter of April 17, 1998, subject to the execution of a mutually acceptable Purchase and Sale Agreement containing the normal representations for such a transaction." *Id*. at 14; May 1 Letter. Such a "subject to contract" phrase, the Sellers point out, is presumed to condition the formation of a binding commitment on the happening of a subsequent event — in this case execution of a definitive purchase and sale agreement. *Id*. at 11. The Sellers reasonably could have so construed this language, they assert. *Id*. at 15; *see also* Restatement (Second) of Contracts § 27 cmt. b ("if either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract").

J.D. Irving counters that, to the contrary, a fact-finder could determine from surrounding circumstances that both parties considered the deal as reflected in the April 17 and May 1 correspondence binding despite the "subject to" language, which lacks the "almost talismanic

[6]Although the Sellers suggest that they would never have agreed to extend the closing date until October 1998 had they not believed they were protected by the May 4 "lock-in" conversion rate, *see* Defendants' Reply at 1-2, this does not necessarily demonstrate that agreement to the May 4 conversion rate was mutual.

qualities" that the Sellers attempt to ascribe to it. Plaintiff's Opposition at 6-10.

Whether a preliminary contract is binding, despite the parties' subsequent failure to execute more formal documentation, depends on the parties' intent. *Mississippi & Dominion S.S. Co. v. Swift*, 29 A. 1063, 1067 (Me. 1894) ("If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed."). The parties' intent, in turn, is measured by objective indicia such as course of dealing and contemporaneous correspondence. *Paris Util. Dist. v. A.C. Lawrence Leather Co.*, 665 F. Supp. 944, 955 (D. Me. 1987), *aff'd*, 861 F.2d 1 (1st Cir. 1988). Among potentially helpful indicia are:

> the extent to which express agreement has been reached on all the terms to be included, whether the contract is of a type usually put in writing, whether it needs a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether a standard form of contract is widely used in similar transactions, and whether either party takes any action in preparation for performance during the negotiations. Such circumstances may be shown by oral testimony or by correspondence or other preliminary or partially complete writings.

Restatement (Second) of Contracts § 27 cmt. c.

The parties' references to the execution of a subsequent formal document — including, of course, explicit statements that an agreement is "subject to" contract — evidence an intent that a preliminary agreement not be binding. *See, e.g., Swift*, 29 A. at 1067 ("If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."); *see also Gel Sys. Inc. v. Hyundai Eng'g & Constr. Co.*, 902 F.2d 1024, 1027 (1st Cir. 1990) (fact that a writing specifically contemplates future execution of

formal contract gives rise to "strong inference" parties do not intend to be bound; applying Massachusetts law) (citation and internal quotation marks omitted); *State Y.M.C.A. v. Picher*, 8 F. Supp. 412, 414 (D. Me. 1934) (inasmuch as Y.M.C.A. board approved execution of trust contract and no contract executed, no binding agreement arose); *Looman Realty Corp. v. Broad St. Nat'l Bank of Trenton*, 180 A.2d 524, 530 (N.J. Super. Ct. App. Div. 1962) (language that acceptance of offer "subject to the execution of a formal contract" strongly evidenced board's intent not to be bound; applying New Jersey law).

The use of the phrase "subject to" is not, however, necessarily decisive. *See, e.g., Arnold Palmer Golf Co. v. Fuqua Indus., Inc.*, 541 F.2d 584, 589-90 (6th Cir. 1976) (whether agreement containing "subject to contract" language binding raised issues of fact, precluding summary judgment; applying Ohio law); *Rand-Whitney Packaging Corp. v. Robertson Group, Inc.*, 651 F. Supp. 520, 529-30 (D. Mass. 1986) (finding binding contract despite language that parties intended to enter into definitive asset purchase agreement; applying Massachusetts law); *Field v. Golden Triangle Broad., Inc.*, 305 A.2d 689, 693 (Pa. 1973) (discerning binding agreement to negotiate open terms in good faith despite language that agreement "[s]ubject to agreement on a formal contract") (internal quotation marks omitted).[7]

Turning to the facts of this case, the Sellers perceive the circumstances as pointing to a near inescapable conclusion that the agreement at issue here was non-binding. Defendants' Memorandum at 13-14. For example, they note, transactions of the type at issue normally are formally

[7]The Sellers criticize J.D. Irving's reliance on caselaw from jurisdictions other than Maine. Defendants' Reply at 2. Research, however, yields no Maine case squarely on point. Hence, consideration of caselaw from other jurisdictions applying principles adopted in Maine to facts similar to those at issue here is instructive and appropriate in determining how the Maine Law Court likely would rule.

documented; the draft purchase and sale agreement was detailed; the transaction involved a substantial sum of money (more than $1 million); and neither party took any significant action in preparation for performance. *Id*. Most tellingly, the Sellers assert, J.D. Irving expressly conditioned its acceptance on a formal contract, and the parties never reached agreement on all terms. *Id*. at 14. J.D. Irving, the Sellers suggest, could not have accidentally or casually chosen to make the preliminary agreement "subject to" a formal contract; Irving is a highly sophisticated businessman.[8] *Id*. In addition, the Sellers note, J.D. Irving did propose a host of changes to Rudman's draft purchase and sale agreement — underscoring, in their view, the importance to J.D. Irving of remaining free to negotiate further terms and conditions. *Id*. at 15. Moreover, the Sellers contend, neither party partially performed the contemplated contract; the parties did not expressly agree to negotiate in good faith; and no consideration was exchanged. Defendants' Reply at 6-7. The Sellers tendered an offer via the June 17 Draft that was not accepted. *Id*. at 7-8. Subsequently, they revoked the offer, only after which J.D. Irving ineffectually and belatedly attempted to accept it. *Id*.

Of further relevance:

1. Although Pond, of J.D. Irving, acted as though the transaction had been finalized (behavior arguably probative of J.D. Irving's intent to be bound), he did so commencing in early April 1998, prior to the alleged formation of a binding agreement.

2. Although Bullock expressed concern about J.D. Irving's good faith (thus arguably evidencing a perception that J.D. Irving was bound to negotiate in good faith), his concern encompassed Pond's behavior in early April 1998, prior to the alleged formation of a binding

[8]This is particularly true, the Sellers argue, because Irving is a Canadian businessman and, under Canadian law, a "subject to formal contract" phrase presumptively means a preliminary agreement is non-binding. Defendants' Memorandum at 14-15.

agreement.

3. Bullock testified that, as of the time he conveyed to Rudman his desire to call off the transaction, he did not believe he had entered a binding commitment because nothing had been signed.

A trier of fact reasonably could deduce, from these circumstances, that J.D. Irving did not intend to be bound by the parties' agreement; on the other hand, such a deduction is not, as the Sellers would have it, a foregone conclusion. J.D. Irving reconstructs from the facts of record a strikingly different but equally plausible scenario, in which the parties "accept[ed] a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that ha[d] been settled in the preliminary agreement." Plaintiff's Opposition at 5 (quoting *Teachers Ins. & Annuity Assoc. v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987) (internal quotation marks omitted)). Such a binding preliminary agreement would have barred the parties from "renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement." *Id*.

A trier of fact could discern such a scenario from the following:

1. Indicia that the Sellers perceived the deal after May 1 as binding, including Rudman's contemporaneous references to the April 17 Letter as a "commitment letter" and the May 1 Letter as the acceptance of an offer, the care with which the April 17 Letter was drafted, Rudman's subsequent deposition testimony that he considered the parties after May 1, 1998 bound to negotiate a formal agreement in good faith and Bullock's testimony that Rudman advised as of May 29, 1998 that Bullock was "committed to the transaction." Also: Rudman's instruction to Tomlinson to inform prospective offerors that the property had been taken off the market, Bullock's desire to

inform friends that he had sold his shares to J.D. Irving, steps taken by the Sellers to move toward closing, including exploration of title to the New Brunswick property, and an apparent assumption by the Sellers that J.D. Irving would be running the Club as of summer 1998.

2. Indicia that J.D. Irving perceived the deal after May 1 as binding, including its requests to extend the deadline within which to respond to the April 17 Letter and for instructions on the manner in which to respond, its concern to keep word of the transaction confidential, its apparent assumption that as of summer 1998 it would be managing the Club, and (to a lesser extent) Dever's subsequent testimony that he perceived J.D. Irving as having been committed to negotiate a final agreement in good faith.

3. Indicia that after May 1, both parties perceived an obligation to negotiate the deal to a conclusion in good faith, including Bullock's concern that J.D. Irving was not acting in good faith in carrying out the transaction and Rudman's testimony that both the Sellers and J.D. Irving were obligated to negotiate a purchase and sale agreement in good faith.[9]

4. The agreement of the parties on all essential terms (which could be found by a trier of fact for the reasons discussed in subsection III(B)(1), above).

5. The parties' lack of disagreement on any of the "boilerplate" items subsequently negotiated in drafts of the purchase and sale agreement, such as additional corporate representations, and their prompt negotiation of a solution upon the discovery of a serious problem regarding title to the New Brunswick land.

6. Indicia that the Sellers could have been motivated to end the transaction by external

[9]Under such a scenario, the court would not need to imply a duty of good faith and fair dealing as a matter of law. *See* Defendants' Reply at 7.

considerations such as the falling value of the Canadian dollar and dissension between Allen and Bullock.

In short, the Sellers fail to demonstrate entitlement to summary judgment on the basis that there is, as a matter of law, no enforceable contract upon which to predicate specific performance. There is sufficient evidence from which a reasonable trier of fact could conclude that the parties as of May 1, 1998 agreed on all essential terms and understood that they had entered into a binding agreement to memorialize the terms already agreed upon in a formal document and negotiate remaining open terms in good faith.

C. Statute of Frauds

The Sellers finally argue that the alleged contract at issue is unenforceable in that it violates the statute of frauds. Defendants' Memorandum at 17-18. The statute of frauds, the Sellers assert, applies both to contracts for the sale of corporate shares and to those concerning an interest in land. *Id*. at 17. To pass muster under the statute of frauds, a writing must contain all essential terms of the asserted agreement, including price. *Id*. at 17-18. Because of the parties' disagreement on conversion price, the Sellers reason, there is no writing reflecting consensus on price. *Id*. at 18.

Assuming *arguendo* that the statute of frauds applies to a contract to transfer interest in corporate shares, a trier of fact could find on this record that the April 17 and May 1 letters do reflect agreement on price — namely, that the Sellers would be paid a specific amount of cash at closing in Canadian dollars and a promissory note from J.D. Irving to be converted to U.S. dollars at closing. Accordingly, the April 17 and May 1 writings would suffice to satisfy the statute of frauds. *See, e.g.*, *Wilson v. DelPAPA*, 634 A.2d 1252, 1254 (Me. 1993) (series of writings may collectively satisfy statute of frauds even if none does so singly).

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **DENIED**.[10]

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of March, 1999.

_____

David M. Cohen
United States Magistrate Judge

[10]Had Canadian law applied in this case, the outcome would have been the same. In Canada, as in Maine, contracts must reflect a meeting of the minds as to all essential terms. *See, e.g., Bahamaconsult Ltd. v. Kellogg Salada Canada Ltd.* [1976] 75 D.L.R.3d 522, 523. The enforceability of preliminary agreements hinges on the parties' intent. *See, e.g., Alta-West Group Invs. Ltd. v. Femco Fin. Corp*. [1984] A.J. No. 697 ¶ 21 (intent may be reflected by words used in documents, conduct during negotiations and subsequent to signing of documents). Use of "subject to contract" language is compelling, but not necessarily conclusive, evidence of an intent not to be bound. *See, e.g., Marathon Realty Co. v. Toulon Constr. Corp.* [1987] 80 N.S.R.2d 390, 403 (in absence of "cogent evidence of a contrary intention" use of "subject to formal contract" clause is construed to postpone liability until execution of formal document); S.M. Waddams, *The Law of Contracts* 35 (3d ed. 1993) ("The use of a well-known formula like 'subject to contract' is certainly strongly suggestive that there is no concluded contract, but it should not, it is suggested, be decisive. The law does not favour magic formulas, and no expression is sacrosanct. The court should take into account all the circumstances in deciding whether a contract is formed or not") (footnote omitted).